

Should the EU Think Twice Before Dumping its Spitzenkandidaten?

Mark Dawson

2019-05-30T09:48:15

With the dust barely settled from the European elections, the horse-trading for the most important EU-level positions has begun. Much of the analysis has focused on one aspect of the election result: the fragmented European Parliament it leaves in its wake. With the centre-left and centre-right parties shedding seats to other groupings, it is undoubtedly far more difficult to crown one party as the 'winner' of this election, justifying its lead candidate assuming the Commission's Presidency. This will be a 'coalition' Parliament, with the support of several pro-European groupings necessary for the EU's legislative agenda to progress. In this sense, the result gave ammunition to those eager to dump the 2014 *Spitzenkandidaten* system. If there is a clear majority against each of the main *Spitzenkandidaten*, a process of inter-factional bargaining between the Member States seems the only way forward.

Another aspect of the election result, however, seems just as important. If initial calculations are correct, around 51% of Europeans voted in these elections. This is a level that sits somewhere between the average for Mid-term and Presidential US elections (a process that no-one would assume yields 'second-order' political legitimacy). The elections were fought on themes – climate change, migration, 'big tech' and the openness of economic borders – that were both shared between European voters and which frame debates simultaneously at the national and EU levels. For perhaps the first time, these were elections (including for populist groupings) that were fundamentally *about Europe*.

The results in short should give some pause to those who insist that Europe is a *demosi*-cracy, in which the EU is a grouping of peoples 'who govern together, but not as one'. How can the answer of pro-European leaders to this exercise be *the very next day* to cast it to one side, reserving the right to choose the individuals who will guide EU politics for the next five years themselves? The results thus create a paradox: they make a moral mockery of the Treaty-based right of EU leaders to negotiate behind closed doors a candidate for the Commission Presidency. At the same time, they do not provide a clear map on which candidate carries the direct electoral legitimacy to rule in the name of Europe's people.

In truth, this is not the first time this has happened. In 2014 too, the EPP left the election without a majority in Parliament. Equally then, a coalition of leftist and liberal pro-European parties could have mustered support in the European Parliament for an alternative candidate. The choice of the main groupings, however, was to stand firm behind the *Spitzenkandidaten* system, leading to Juncker's confirmation. Juncker followed with a vow, in his opening speech to the EP, to lead a 'political' Commission' with a clearer political agenda. One way of evaluating whether to do utilize this system again is to consider how it worked first time around: is there evidence that the *Spitzenkandidaten* system, and the 'political' Commission that

it created, undermined the Commission's functions, or did it actually yield results (or even improve the EU's political legitimacy)? In short, to identify the way forward benefits from looking at the past, namely at the 'Juncker experiment'.

Casting Doubt on the 'Political Commission'

The arguments against a political Commission are complex. In crude terms, however, one can distinguish between arguments that the Commission *cannot* do politics and those positing that it *should* not do so. The first set of arguments mainly concern the Commission's legal and institutional context. This context severely limits the very ability of the Commission to be politically responsive. The Treaties significantly circumscribe the areas in which the EU can act meaning that the Commission may simply be unable to advance proposals to meet some of the key concerns of voters (or may only do so in a limited manner). This problem is further exacerbated by the way in which many Treaty articles are drafted. Many not only circumscribe the areas in which the EU institutions can act but tell them *how to act*. To give one example, the Articles on EMU anchor EU policy in this area in principles of budgetary responsibility and the avoidance of moral hazard. Thus, a Commission or Central Bank that wanted to reverse conditionality in response to the verdict of voters would not only be taking a political risk but potentially be acting unconstitutionally. Finally, the structure of the Commission fits uneasily with a politicised policy-making process. A Commission President, of whatever political stripe, must direct Commissioners of varying political persuasions, with the segmentation of the Commission into separate DGs creating a well know silo effect (making it difficult to prioritise policies). In this sense, the Commission may simply be unable to align its policy-making with the general views of EU citizens.

A second set of arguments runs even deeper. Even if the Commission *could* cast aside these constraints, perhaps it *should not* do so given the nature of the tasks it has to fulfil. Principally, the Treaties assign to the Commission the task of being a 'guardian of the Treaties'. This nebulous task demands that the Commission impartially enforces EU law, that it acts as an honest broker between states in the law-making process and that it intervenes in areas such as competition and state aid in the general European interest. These sets of tasks seem to require the Commission to be a neutral regulator (or as the CJEU has recently put it, a 'good administrator'). This sits uneasily with a Commission whose success depends on the support of political majorities, which could be seen as improperly prejudicing regulatory decisions (when the Commission for example must decide whether to deem illegal state aid to a company employing thousands or when applying rule of law standards against a popular domestic government). These arguments contest the desirability of politicization and with it, the legitimacy of selecting the Commission President through partisan means.

Juncker's Political Commission

These arguments seem compelling in the abstract. They are, however, less convincing (yet on some points more convincing) when assessed against the

experience of Juncker's 'political' Commission. Let us deal with the first, capacity-based, set of objections first. In answer to these objections, there is some evidence that the Juncker Commission was relatively successful in focusing its political agenda, achieving results in areas of importance to voters. To deal with 'silo' problems, Juncker introduced a Vice-President system with both 'area' VPs (responsible for groupings of portfolios) and a 'first' VP (whose go-ahead was needed for initiatives to advance). This was guided by 10 'flagship' projects and a series of work programmes agreed with the other main EU institutions. This significantly slimmed the legislative agenda, with fewer proposals advanced, the majority of which related to the flagship items. There was also a clear ideological spin placed on certain policy items. Juncker's politics – as a centrist Christian democrat, committed to a social market economy – was felt in initiatives like the 'Pillar of Social Rights', which represents a first legislative breakthrough on EU social matters for almost two decades.

The difficulty was when these key areas were overtaken by events. The danger mentioned above – of the public demanding an EU response to a problem, only for the EU to be legally or politically unable to do so – raised its head, most notably in the context of the refugee crisis. Here, the Commission experienced serious capacity and legitimacy deficits. On the capacity side, its typical toolbox (harmonizing rules) was totally inadequate for the scale of the policy challenge. On the legitimacy side, the Member States soon realised the political salience of more ambitious initiatives on re-location, forcing them to increasingly control the policy agenda (most notoriously through the Turkey agreement). An EP study of the implementation of the flagship projects re-enforces the point: projects in more traditional areas of competence (such as the single market) carry high implementation rates whereas those touching on salient distributive issues or requiring the extensive cooperation of the Member States or Third States, fare poorly. The Juncker Commission was therefore able to 'do politics' but only within the (still limited) political space that the Treaties provide.

What about the second, normative, set of objections? Opinions may vary on whether, empirically speaking, the politicization of the Commission has undermined its regulatory legitimacy. Certainly when dealing with issues such as rule of law backsliding, the political alliance between Juncker's EPP and Viktor Orban's Fidesz has been of little help. There may be perceptions of regulatory bias. This remains a Commission, however, that has taken highly unpopular political decisions, and paid a political price for doing so. At the time of writing, for example, Margrethe Vestager's candidacy for the Commission Presidency is hanging in the balance owing to seeming opposition from Ireland (angry at her fining of a corporate tax hand-out to Apple) and a cool Emmanuel Macron (who opposed her decision to block the merger between Siemens and Alstom).

More broadly, it is difficult, if not impossible, to base the legitimacy of the contemporary Commission on its abilities as an impartial regulator alone. Not only are we living through an age where the notion of a single objective body of rationale knowledge to found regulatory decisions is increasingly contested. We also live in an EU engaged in distributive politics (as Juncker, dealing with issues

from the distribution of refugees to macro-economic divergence, quickly found out). Distributive politics requires choices, and those choices inevitably will be weighed and viewed differently depending on the political views of citizens and officials. The politicization of the Commission may in this sense threaten regulatory legitimacy but seems the 'only game in town' given the challenges European leaders expect the Commission to solve.

Throwing the Baby Out with the Bathwater?

Where does this leave the *Spitzenkandidaten* system? What it reveals is that many objections to the system are not really objections to the democratization and politicization of the Commission as such. Rather, they suggest *even more* radical attempts to democratize the EU. First, regarding the 'capacity-based' set of objections, if the principle barrier to politicization are the heavy restrictions on the EU's competences, this seems a reason to re-visit the competence debate (or even to provide a general legislative competence, coupled with higher decision-making thresholds, as others have suggested). Second, regarding 'normative' objections, if a further barrier to politicization is the politicization of regulatory tasks, this would seem a reason to more clearly separate out the Commission's distributive and regulatory functions (providing the latter set of functions, or even responsible DGs, with higher operational independence).

Finally, if the problem is the unclear result these elections have provided, the solution does not seem to be to ignore them but to devise a better system for aggregating preferences e.g. through giving citizens a second 'direct' vote not only for their MEPs but for their preferred *Spitzenkandidat*. The European Council carries another important function: it is the initiator of Treaty reform. An ambitious Council would consider whether some of these items should be actioned.

If, as seems likely, all of these things are too much for EU leaders to stomach, they might remember that, last time too, they were bounced into accepting someone who they felt was an unattractive and incompetent candidate. What they got was a competent leader, who steered the Union through a number of difficult challenges (not least the Brexit process) and who delivered in 2019 an EU that seems (at least in the short term) to have stood united against its populist opponents. By giving up on the *Spitzenkandidaten* system, the Union would also give up on an important and ongoing experiment in nourishing its democratic foundations (without the guarantee that a better candidate would emerge as a result). When sitting their next difficult meeting, the European Council may consider whether that is a price worth paying.

